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ESTABLISHING EDUCATION PROGRAM INADEQUACY: THE ALABAMA EXAMPLE

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The authors draw on their experience as attorneys for a statewide class of plaintiff school children in the liability phase of ongoing public education reform litigation in Alabama to demonstrate the availability of state and nationally recognized standards concerning educational resources (inputs) and results (outputs) that can serve as evidentiary tools for assessing and for establishing a state public education system's failure to satisfy constitutional mandates of educational adequacy. The Article discusses the usefulness and limitations of using such standards as a starting point in a court's constitutional analysis. It suggests an integrated approach that links input and output standards from both state and national sources to provide inter-related evidence of inadequacy while maintaining allegiance to constitutional adequacy guarantees as the ultimate standard against which all other standards, including state statutes and regulations, must be judged.

INTRODUCTION

In the four decades since the Supreme Court decided *Brown v. Board of Education*,¹ education reform litigation has focused

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1. 347 U.S. 483 (1954).

primarily on the goal of providing all children with equal educational opportunity.² While the first lawsuits addressed the stark inequalities in public education based on race,³ later litigation focused on wealth-based inequities in the nation's education system, which allegedly led to children from poorer school systems receiving worse educations than children from wealthier school systems in violation of state constitutional equity guarantees.⁴

In recent years, advocates and policymakers have begun to realize that exclusive reliance on the traditional equity approach does not go far enough toward solving the problems of the nation's public schools.⁵ Equity theories tend to look mainly at whether school districts receive commensurate funding for their students' education.⁶ Under an equity theory, a school system could be judged legally satisfactory even if students are receiving a poor education as long as all students in the state are receiving the same poor education. The most recent wave of education reform litigation has thus turned to a new approach, based on constitutional principles of educational adequacy, in an effort to improve public schooling.⁷

In contrast to the traditional equity approach, the principle of adequacy looks at the quality of education that students receive.⁸ Adequacy theories hold that students are entitled to receive an education that not only is as good as the education other students in the state receive but also will prepare them in absolute terms for higher education, skilled employment, and other experiences of adult life such as civic participation.⁹ Adequacy theories are not a substitute for equity theories. Rather, they should be used in conjunction with equity theories to ensure that all children receive an education that (1) affords equal opportunity to all children, consistent with

2. See Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. MICH. J.L. REF. 493, 496 (1995).

3. E.g., *Brown*, 347 U.S. at 483.

4. See Underwood, *supra* note 2, at 496, 500, 502-10. See generally Christopher F. Edley, Jr., *Lawyers and Education Reform*, 28 HARV. J. ON LEGIS. 293, 294-95 (1991) (noting that state school finance reform may be the most productive current method of educational reform).

5. See *infra* note 11; William H. Clune, *The Shift from Equity to Adequacy in School Finance*, 8 EDUC. POL'Y 376, 377 (1994).

6. See Clune, *supra* note 5, at 377.

7. See *infra* note 11; Underwood, *supra* note 2, at 500-02, 513-19.

8. See Clune, *supra* note 5, at 377.

9. See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989).

educational need, and (2) is a quality education adequate to prepare students from diverse backgrounds for life in the twenty-first century.¹⁰

Courts in recent years have shown themselves to be increasingly willing to recognize that children have a constitutional right to an adequate education.¹¹ This Article chronicles some of the authors' experiences in litigating such a claim under the state constitution of Alabama. It offers a lawyer's perspective on the substantive norms and evidentiary standards that courts can use in considering claims that a public school system is constitutionally inadequate. Part I discusses state education input standards, which exist in every state and help in assessing the parameters of an adequate education in that state. Part II considers nationally recognized education input standards, which provide a second important source of guidance to courts about the adequacy of state educational inputs. Part III examines educational output standards, which provide achievement-based measures of whether a school system is performing adequately. Finally, Part IV discusses how a court can use these state and national standards as benchmarks for assessing program adequacy during the liability phase of a state constitutional challenge.

In discussing these standards, this Article draws on the example of the liability phase of *Harper v. Hunt*,¹² in the

10. Cf. Molly McUsic, *The Use of Education Clauses in School Finance Reform*, 28 HARV. J. ON LEGIS. 307, 326-33 (1991) (discussing advantages of adequacy claims over equity claims).

11. Kentucky, Massachusetts, New Hampshire, and New Jersey are examples of states whose courts have interpreted their state constitutions to mandate provision of an adequate education. See *Council for Better Educ.*, 790 S.W.2d at 186; *McDuffy v. Secretary of the Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375 (N.H. 1993); see also *Robinson v. Cahill*, 303 A.2d 273, 295 (N.J.) (requiring the state to provide "a thorough and efficient system of . . . schools") (quoting N.J. CONST. art. VIII, § 4), *affirmed as modified*, 306 A.2d 65 (N.J.), *cert. denied*, 414 U.S. 976 (1973), *enforced*, 351 A.2d 713 (N.J.), *cert. denied*, 423 U.S. 913 (1975); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 94 (Wash. 1978) (requiring the state to "make ample provision for the education of all [resident] children") (alteration in original) (quoting WASH. CONST. art. IX, § 1); *Pauley v. Kelly*, 255 S.E.2d 859, 883 (W. Va. 1979) (requiring a "thorough and efficient" school system).

12. No. CV-91-0117-R (Ala. Cir Ct. Montgomery County). This case was consolidated with *Alabama Coalition for Equity, Inc. v. Hunt*, No. CV-90-883-R (Ala. Cir. Ct. Montgomery County). The proper citation to the liability order is *Alabama Coalition for Equity, Inc. v. Hunt*, Nos. CV-90-883-R, CV-91-0117 (Ala. Cir. Ct. Montgomery County filed Apr. 1, 1993), *reprinted in* Opinion of the Justices No. 338, 624 So. 2d 107 app. (Ala. 1993) [hereinafter *Harper Opinion*]. While the authors represented the plaintiff class in the *Harper* case and will use this case name throughout this Article,

Alabama education reform litigation in which the authors of this Article represented plaintiffs. In *Harper*, a statewide class of schoolchildren sued state officials contending that they were being denied their constitutional rights to an adequate and equitable education.¹³ The Montgomery County Circuit Court ruled at the trial level for the plaintiffs, holding that the Alabama Constitution guaranteed all students in the state both an adequate and an equitable education and that the education they were receiving was neither adequate nor equitable.¹⁴ Following this ruling, the court adopted, with a few modifications, a remedy order, prepared by the defendants after consultation with the plaintiffs, that provides a framework for reforming the Alabama public school system to provide an adequate and equitable education to all public school students in the state.¹⁵

other plaintiffs in the consolidated litigation include the Alabama Coalition for Equity, a non-profit corporation then composed of 25 school systems, and a number of individual parents and schoolchildren, as well as plaintiff-intervenors John Doe, a disabled student, and the Alabama Disabilities Advocacy Program. *Id.* at 111. In addition, the court granted motions by most of the original defendants to realign as plaintiffs for the liability phase of the litigation. *See id.* For a fuller description of these and other aspects of the procedural history of this case, see *id.* at 111-12.

13. The class was certified as a statewide class of students who attend or will attend public school in systems in Alabama that are unable to provide them with an adequate education. *Harper Opinion, supra* note 12, at 111. The defendants included the Governor and other state officials. *Id.*

14. *Id.* at 144-65.

15. See Remedy Order, Alabama Coalition for Equity, Inc. v. Folsom, Nos. CV-90-883-R, CV-91-0117-R (Ala. Cir. Ct. Montgomery County Oct. 22, 1993) (on file with the *University of Michigan Journal of Law Reform*) [hereinafter Remedy Order]. Note that the case name has changed as defendant office holders have changed during the course of the litigation. See Order Granting Motions for Substitution of Party Defendants, Alabama Coalition for Equity, Inc. v. Hunt, Nos. CV-90-883-R, CV-91-0117-R (Ala. Cir. Ct. Montgomery County June 9, 1993) (on file with the *University of Michigan Journal of Law Reform*). Governor Folsom replaced Governor Hunt after the latter was convicted of ethics violations. See Keith Bradsher et al., *The 1994 Elections: State by State*, N.Y. TIMES, Nov. 10, 1994, at B9.

In February 1995, Alabama's new governor, Fob James, and the Attorney General filed a petition for a writ of prohibition or mandamus attacking the court's liability and remedy orders. See *Ex Parte* Fob James, Jr., No. 1940679 (Ala. Apr. 10, 1995) (on file with the *University of Michigan Journal of Law Reform*). The Alabama Supreme Court rejected the petition, ruling that the time for challenging the liability order had passed and that other orders were not then subject to appeal. *Id.*

On May 19, 1995, the Alabama Supreme Court reversed the trial court's denial of motions to intervene by plaintiff intervenors representing children allegedly receiving an adequate education, gifted children, and parents and by defendant intervenors representing taxpayers and citizens of Alabama. *Pinto v. Alabama Coalition for Equity, Inc.*, Nos. 1931030, 1931031, 1931141, 1931142, 1931149, 1931150 (Ala. May 19, 1995). The court held that the intervenors were entitled to intervene in the ongoing remedy phase of the litigation but would not be permitted to reopen or

The *Harper* litigation provides a good model for courts considering educational adequacy claims. Plaintiffs used state input standards, national input standards, and state and nationally recognized output standards to establish that the Alabama schools were constitutionally inadequate.¹⁶ The court did not adopt this Article's taxonomy of standards or use national recognition *per se* as a basis for considering standards. Moreover, plaintiffs did not advocate, and the court did not embrace, any single set or source of standards as definitive

relitigate issues of liability. *Id.* at 15 ("That this holding does *not* extend to the *liability* phase, however, cannot be overemphasized."). Following this decision, the Pinto plaintiff intervenors filed a motion to vacate the Remedy Order. *See* Order at 2, *Alabama Coalition for Equity, Inc. v. James*, Nos. CV-90-883-GR, CV-91-0117-GR (Ala. Cir. Ct. Montgomery County Oct. 6, 1995) [hereinafter Order of Oct. 6] (on file with the *University of Michigan Journal of Law Reform*).

In April 1995, the State Board of Education and the State Superintendent of Education filed proposed funding plans. Response to Order to Submit Education Funding Plan, *Alabama Coalition for Equity* (Nos. CV-90-883-R, CV-91-0117-R) (on file with the *University of Michigan Journal of Law Reform*). On June 15, 1995, the original plaintiffs filed objections to the proposed funding plans and requested a hearing on the plans. Objections to Defendants' Proposed Plan for Funding K-12 Education, *Alabama Coalition for Equity* (Nos. CV-90-883-R, CV-91-0117-R) (on file with the *University of Michigan Journal of Law Reform*); Plaintiff Intervenor's Objections to Defendants' Proposed Funding Plan, *Alabama Coalition for Equity* (Nos. CV-90-883-R, CV-91-0117-R) (on file with the *University of Michigan Journal of Law Reform*). On July 27, 1995, the court granted defendants the State Board of Education and the Superintendent of Education a further extension until September 30, 1995 to file additional plans under the Remedy Order. Order, *Alabama Coalition for Equity, Inc. v. James*, Nos. CV-90-883-R, CV-91-0117-R (Ala. Cir. Ct. Montgomery County July 27, 1995) (on file with the *University of Michigan Journal of Law Reform*).

Included among new education legislation enacted by the Alabama Legislature in July 1995 were the Foundation Program Act, 1995 Ala. Acts 314, the Capital Improvements Bond Act, 1995 Ala. Acts 752, and the Accountability Act, 1995 Ala. Acts. 313.

On August 23, 1995, after requesting and receiving an advisory opinion by the Judicial Inquiry Commission, and in order to remove "any possible appearance of impropriety," the trial judge recused himself from the litigation. *See* Order, *Alabama Coalition for Equity, Inc. v. James*, Nos. CV-90-883-R, CV-91-0117-R (Ala. Cir. Ct. Montgomery County Aug. 23, 1995) (on file with the *University of Michigan Journal of Law Reform*). The motion to recuse was based largely on the judge's public comments about the case during his unsuccessful campaign for a seat on the Alabama Supreme Court. *See* Motion to Recuse, *Alabama Coalition for Equity* (Nos. CV-90-883-R, CV-91-0117-R) (on file with the *University of Michigan Journal of Law Reform*). As this Article went to press, the new judge in the case had denied motions by the Governor and Attorney General to dismiss the liability and remedy orders as well as a motion by the Pinto intervenors to vacate remedial orders, Order of Oct. 6, *supra*, at 6, and she had certified earlier remedial orders as final, *id.* at 7. She also extended filing deadlines for implementation plans until November 15, 1995, and set the case for arguments in December 1995 on whether newly enacted funding and accountability legislation satisfied the Remedy Order and provided adequate funding and accountability systems. *Id.* at 7-8.

16. *See infra* Parts I-III.

of educational adequacy. Rather, the court recognized educational adequacy guaranteed by the Alabama Constitution to be an evolving concept that is best informed by a variety of standards. The decision in *Harper* demonstrates that appropriate criteria for assessing educational adequacy do exist and that they are judicially manageable for purposes of determining constitutional liability and relief.¹⁷

I. STATE EDUCATION INPUT STANDARDS

In looking for standards with which to evaluate education program adequacy, one logical starting place is an individual state's own educational input standards.¹⁸ Every state has its own body of education law and policy, setting out input standards that touch on many aspects of public school education. These standards may be derived from at least three different sources: (1) the state's constitution, (2) the state's education statutes, and (3) the state's educational regulations and administrative policies.

Although the constitution is the ultimate source of the right to an adequate education and the metric for assessing a school system's adequacy, other sources of state input standards can provide a starting point in assessing the quality of education being offered in the public schools. This Part discusses the three main sources of state educational standards used by the *Harper* court to reach its decision that the Alabama schools were constitutionally inadequate.

A. The State Constitution

Every state constitution contains an education clause that commits the state to providing its children with an education.¹⁹

17. This Article focuses on the liability phase of adequacy litigation, rather than the remedial phase.

18. Inputs are conventionally understood to refer to the resources and opportunities that dollars can purchase, in terms of items such as books, personnel, programs, and equipment. Cf. EDWIN MARGOLIS & STANLEY MOSES, *THE ELUSIVE QUEST: THE STRUGGLE FOR EDUCATIONAL OPPORTUNITY* 12 (1992) (defining education inputs as "the amount of dollars available for capital and current costs").

19. See Underwood, *supra* note 2, at 511 n.101. The Alabama Constitution's education clause was amended in the wake of *Brown v. Board of Education*, 347 U.S.

The presence of these education clauses in state constitutions imposes a special burden on the states with respect to public education.²⁰ Precisely what level of education these provisions guarantee depends on how they are interpreted by the state's judiciary, which generally considers, among other factors, the precise wording of the education clause, its history, and the purposes that it is intended to serve.²¹

As have courts in at least four other states,²² the Alabama court held that the Alabama Constitution guarantees students the right to an adequate education.²³ The court based its decision on adequacy on its interpretation of section 256, the education clause, of the Alabama Constitution of 1901, as well as on state and federal due process guarantees.²⁴ Alabama's education clause states that the legislature "shall establish, organize, and maintain a liberal system of public schools throughout the State for the benefit of the children thereof between the ages of seven and twenty-one years."²⁵

First, the court determined that the education guarantee of section 256 was mandatory. Noting that the clause used the

483 (1954), to deny any right to a public education. See REPORT OF THE ALABAMA INTERIM LEGISLATIVE COMMITTEE ON SEGREGATION IN THE PUBLIC SCHOOLS (1954), reprinted in Jay Murphy, *Can Public Schools Be "Private"?*, 7 ALA. L. REV. 48 app. (1954); see also Affidavit of Albert P. Brewer at 2, *Alabama Coalition for Equity* (Nos. CV-90-883-R, CV-91-0177-R) (on file with the *University of Michigan Journal of Law Reform*); Affidavit of Professor Jay Murphy at 2, *Alabama Coalition for Equity* (Nos. CV-90-883-R, CV-91-0177-R) (on file with the *University of Michigan Journal of Law Reform*). The *Harper* court declared the amendment void *ab initio* under the federal Equal Protection Clause on motions for summary judgment. Order, *Alabama Coalition for Equity, Inc. v. Hunt*, Nos. CV-90-883-R, CV-91-0117-R (Ala. Cir. Ct. Montgomery County Aug. 13, 1991) (on file with the *University of Michigan Journal of Law Reform*).

The wording of education clauses varies from state to state. Compare, e.g., KY. CONST. § 183 (requiring "an efficient system of common schools") with ILL. CONST. art. X, § 1 (requiring "an efficient system of high quality public educational institutions and services").

20. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 111-12 (1973) (Marshall, J., dissenting).

21. See William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639 (1989) (discussing decision-making approaches of state courts to state education clauses).

22. See *supra* note 11.

23. In addition to its holding on adequacy, the court held that § 256 and the equal protection guarantees of the Alabama Constitution required the state to provide public education to all students in the state on an equitable basis. *Harper Opinion*, *supra* note 12, at 148-51.

24. See *id.* at 151-62.

25. ALA. CONST. art. XIV, § 256.

word "shall," the court found that it was the framers' intent that this provision impose a mandatory duty on the state to provide the children of Alabama with an education at public expense.²⁶

Second, the court considered what kind of education the state was required to provide. After examining the history of section 256, the court concluded that its framers took an expansive view of the education that had to be offered.²⁷ The court noted that the proceedings of the 1901 Constitutional Convention included a number of references to the need for the state to provide a quality education, including a statement in the convention president's opening address that stressed the importance of a public school system that would "'place within the reach of every child in the state . . . such instruction as will qualify him for the responsible duties of life.'"²⁸ The court also credited expert trial testimony about the framers' strong interest in public education.²⁹

The court then found that this strong commitment to education was reflected in the framers' choice of language. Section 256 requires the state to provide a "liberal" education.³⁰ The court gave considerable weight to the framers' choice of the word "liberal," accepting expert testimony and existing Alabama precedent that the word denoted an education that is "generous" and "bountiful" and concluding that this required an education system "that is generous and broad-based in its provision of educational opportunity."³¹

Additionally, the court read section 256 to "impl[y] a continuing obligation to ensure compliance with evolving educational

26. *Harper Opinion*, *supra* note 12, at 146-48.

27. *See id.* at 151-54.

28. *Id.* at 152 (quoting 1 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA 15 (1901)).

29. *Id.* Dr. Ira Harvey, a professor at the University of Alabama at Birmingham and author of A HISTORY OF EDUCATIONAL FINANCE IN ALABAMA (1989), which the court called the leading publication on the history of public school finance in Alabama, *id.* at 119, testified about the framers' firm commitment to the education of Alabama schoolchildren, *see id.* at 152.

30. ALA. CONST. art XIV, § 256.

31. *Harper Opinion*, *supra* note 12, at 153. In addition to Dr. Harvey's testimony, the court credited testimony concerning the meaning of "liberal" from Dr. Wayne Flynt, *id.* at 152, Distinguished University Professor at Auburn University. Dr. Flynt later served as the court-appointed facilitator for the parties during consultations concerning the development of the Remedy Order, *supra* note 15. *See* Order at 3, Alabama Coalition for Equity, Inc. v. Folsom, Nos. CV-90-883-R, CV-91-0117-R (Ala. Cir. Ct. Montgomery County June 9, 1993) (on file with the *University of Michigan Journal of Law Reform*) [hereinafter Order of June 9].

standards" by providing "an education that will *in fact* benefit [students] by offering them appropriate education for the responsible duties of life."³² Accordingly it defined educational adequacy to include, at a minimum, the opportunity to attain nine specified capacities needed to enable students to function at national and international levels.³³

The court also found a right to an adequate education in the due process guarantees of the Alabama Constitution, as well as in the Federal Due Process Clause, based on the well-settled principle that "when the state deprives citizens of liberty for the purpose of benefiting them with a service, due process requires that the service be provided to them in an adequate form."³⁴

Thus, the Alabama Constitution, as interpreted by the Alabama Circuit Court, guarantees all students in the state the right to an education of a level of quality considered to be legally adequate. Its education clause establishes a broad guarantee of educational adequacy that applies to all public schools in the state. Together, the education and due process guarantees of the Alabama Constitution establish broadly expressed requirements that the state provide a quality, and not simply an equal, public school education to each student.

B. State Statutory Law

State laws, both statutory and administrative, can also provide guidance in assessing the adequacy of state-provided

32. *Harper Opinion*, *supra* note 12, at 154. The court also recognized that the constitutionality of the state school system must be judged relative to the special needs of particular students and schools. *Id.* at 115. For example, the opinion underscored the role that race has played in the existing system and the special problems of rural schools and systems. *Id.* at 123-24.

33. *Id.* at 166. See *infra* note 187 for a listing of these nine capacities.

34. *Harper Opinion*, *supra* note 12, at 161. Along with finding a federal due process violation, the court found that the Alabama Constitution affords due process rights to Alabama students, who are deprived of liberty through mandatory attendance, by analogy to case law interpreting the United States Constitution to afford due process rights to mentally retarded persons who are deprived of liberty by the state. *Id.* at 161 (citing ALA. CONST. art. I, §§ 6, 13; U.S. CONST. arts. V, XIV; *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971) (holding that mentally ill and mentally retarded persons are entitled to due process), *aff'd in part and rev'd in part*, 503 F.2d 1305 (5th Cir. 1974)). The court further concluded that many Alabama schoolchildren were deprived of their state law entitlement to an adequate education arbitrarily and without any constitutionally sufficient justification in violation of due process guarantees. *Id.* at 162.

education. State education statutes cover a broad range of subjects: health and safety, personnel, educational resources, school finance, and economic and social barriers to learning.³⁵ A state's education statutes are an important source of specific educational inputs considered to be part of an adequate education;³⁶ they can and should provide some guidance to a court looking for the legal contours of educational adequacy.

At the time of the *Harper* trial, Alabama's most recent education reform statute was the Alabama Education Improvement Act of 1991 (the Act).³⁷ The *Harper* court looked to the Act's input requirements as one source of standards in its holding that the Alabama school system was not adequate.³⁸ The court did not hold that the Act by itself defined a constitutionally adequate education in Alabama; rather, the court's reliance on a broad array of other standards makes clear that it did not. The court, however, did refer to the Act as one "meaningful reference point for assessing minimal educational adequacy."³⁹ The Act's requirements for performance-based accreditation,⁴⁰ along with another source of state administrative educational standards,⁴¹ "represented an acknowledgment of the present inadequacy of Alabama schools by the state and spoke of the need for major, structural change."⁴²

35. See, e.g., ALA. CODE §§ 16-1-1 to -44-3 (1975); FLA. STAT. chs. 228.001-235.44 (1993).

36. See James S. Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 378-79 (1990) (discussing the role of legislatively enacted education standards in the judicial reform of public school systems).

37. Alabama Education Improvement Act of 1991, 1991 Ala. Acts 602 (codified in scattered sections of 16 ALA. CODE (Supp. 1994)), *repealed in part by the Accountability Act*, 1995 Ala. Acts 313.

38. See *Harper Opinion*, *supra* note 12, at 128.

39. *Id.*

40. See ALA. CODE § 16-3-18.4 (Supp. 1994).

41. WAYNE TEAGUE, STATE DEPT' OF EDUC., A PLAN FOR EXCELLENCE: ALABAMA'S PUBLIC SCHOOLS (1984) [hereinafter PLAN FOR EXCELLENCE]; see also ALA. ADMIN. CODE r. 290-030-010-.05 (1991) [hereinafter *Performance-Based Accreditation Standards*]; STATE DEPT' OF EDUC., ACCREDITATION STANDARDS FOR COMBINED ELEMENTARY AND SECONDARY SCHOOLS GRADES K-12, Bulletin No. 10, at 5-19 (1981) (on file with the *University of Michigan Journal of Law Reform*).

In the *Harper Opinion*, *supra* note 12, the court referred to *Performance-Based Accreditation Standards*, which were the standards codified in the Alabama Administrative Code under the title "Standards for Accreditation of Alabama School Systems." In order to be consistent with the opinion, this Article will refer to such standards as *Performance-Based Accreditation Standards* but will cite to the subsection of the Code where that standard was codified. This portion of the Code has since been repealed and replaced; the current version, now entitled *Standards for Accreditation of Alabama Schools*, is codified at ALA. ADMIN. CODE r. 290-030-010-.03 (1995).

42. *Harper Opinion*, *supra* note 12, at 128.

The Act set out categories of input standards in a wide range of areas. Teacher certification, curriculum, school facilities, attendance, school terms, and special-needs students were among the educational issues that the Act addressed. In its decision, the court made express reference to the Act's mandates regarding a number of educational resources:

- *School Facilities.* The Act required that all schools in the state "[p]rovide acceptable facilities conducive to an effective teaching and learning environment, including safe buildings having adequate space, heating and air conditioning, rest-room facilities and sanitary conditions."⁴³
- *School Curriculum.* The Act called for all high school students to finish four years of science and mathematics, and for all students to achieve computer literacy.⁴⁴ It also called for all students to have access to elective courses "including but not limited to foreign languages, fine arts, physical education, [and] vocational and technical preparation."⁴⁵
- *Textbooks.* The Act required all schools to provide adequate textbooks to all students.⁴⁶
- *Educational Supplies.* The Act required that all public schools provide "adequate resources for instruction . . . including . . . instructional supplies."⁴⁷
- *School Transportation.* The Act required that all school systems "[c]omply with the requirements of federal and state governments and agencies and the state board of education with respect to the condition and safety of vehicles, scheduling of routes, training and licensing of drivers and load capacity of buses."⁴⁸

The court used each of these requirements from the Act, along with other standards for educational inputs, as part of the basis for its holding that the Alabama schools were not legally adequate.

43. See *id.* at 128 (quoting 1991 Ala. Acts 602, 620).

44. See *id.* at 131 (quoting 1991 Ala. Acts 602, 613).

45. *Id.* (quoting 1991 Ala. Acts 602, 614).

46. *Id.* at 134 (citing 1991 Ala. Acts 602, 621).

47. *Id.* (quoting 1991 Ala. Acts 602, 621).

48. *Id.* at 136 (quoting 1991 Ala. Acts 602, 620).

C. State Regulations and Administrative Policies

Along with constitutional and statutory law, state administrative law and policy can be an additional source of educational standards. These administrative laws and policies may be found in a number of places, including state regulations, state accreditation systems and manuals, and written policies of the state department of education and other education policymakers.

The *Harper* court paid careful attention to state administrative standards and, in particular, to state school accreditation standards.⁴⁹ At the time of trial, Alabama had two sources of accreditation standards: an older system of accreditation that had been in existence for a number of years and the newer performance-based accreditation system required by the Act.⁵⁰ The *Harper* court referred to state accreditation standards as "state-sanctioned criteria for schools" and indicated that they were one appropriate benchmark for assessing educational adequacy.⁵¹

The accreditation standards covered many of the areas touched on by the Act, but they generally did so in greater detail. For example, the accreditation standards included specific staff ratios in a number of areas, such as the number of library media specialists per student as well as maximum class sizes.⁵² The accreditation standards also imposed specific requirements with respect to other aspects of the educational program. In the area of curriculum, for example, they expressly called for students in kindergarten through eighth grade to have access to "broad and varied curricular offerings" in areas including art, music, computer education, and physical education.⁵³ They also required that all students in the state have the opportunity to pursue college-preparatory courses.⁵⁴

49. See *id.* at 127.

50. *Id.* at 127 n.25, 128.

51. See *id.* at 127.

52. See *id.* at 132-33 (citing *Performance-Based Accreditation Standards*, *supra* note 41, at (2)(c)(1), (12), (17)).

53. *Id.* at 131 (quoting *Performance-Based Accreditation Standards*, *supra* note 41, at (2)(c)(4)).

54. *Id.* (citing *Performance-Based Accreditation Standards*, *supra* note 41, at (2)(c)(5)).

In addition to the accreditation standards, the *Harper* court looked to other authoritative statements of educational standards from the Alabama Department of Education. Perhaps the leading statement was a document called *A Plan for Excellence: Alabama's Public Schools (A Plan for Excellence)*, produced in 1984 by the Alabama Department of Education and the Alabama Superintendent of Education.⁵⁵ *A Plan for Excellence* was described by the *Harper* court as a "blueprint for improvement of Alabama's schools" that was formally commended by the Alabama Legislature at the time of its issuance.⁵⁶

Like the accreditation standards, *A Plan for Excellence* contained more specific educational standards than either the Alabama Constitution or the Alabama Education Improvement Act of 1991. For example, *A Plan for Excellence* contained detailed directions about the kind and amount of coursework that should be required for graduation.⁵⁷ It also made specific findings with respect to such details as classroom temperature,⁵⁸ leaky roofs,⁵⁹ and the assignment of homework.⁶⁰

Like the statutory provisions, these state regulations and administrative policies provided important guidance to the court in determining educational inadequacy. The court did not expressly adopt any one document or source as setting forth the legal standard of adequacy. Rather, looking at these laws and policies as a whole, along with other sources of input and achievement standards, and guided by the state constitution and expert testimony, the court concluded that the Alabama public school system was constitutionally inadequate to prepare students for the responsible duties of life in today's society.⁶¹

II. NATIONALLY RECOGNIZED EDUCATION INPUT STANDARDS

In addition to state education input standards, there is a body of national input standards that can and should inform a

55. See *PLAN FOR EXCELLENCE*, *supra* note 41.

56. See *Harper Opinion*, *supra* note 12, at 128.

57. See *PLAN FOR EXCELLENCE*, *supra* note 41, at 40, 43.

58. *Harper Opinion*, *supra* note 12, at 129 (citing *PLAN FOR EXCELLENCE*, *supra* note 41, at 91).

59. See *id.* (citing *PLAN FOR EXCELLENCE*, *supra* note 41, at 91).

60. See *id.* at 134 (noting that "[t]he *Plan for Excellence* calls for homework to be required in every subject area").

61. *Id.* at 165.

court's determination of educational adequacy. Because state statutory and administrative input standards are inherently limited, national standards are an important component of any state constitutional adequacy analysis. In considering national standards, courts and advocates must be sensitive to local educational concerns but also must ensure that local pressures do not undermine the enforcement of constitutional rights.

Some of these federal input standards, like the state standards, are codified in statutes and regulations that apply to federal programs, such as Chapter 1⁶² or special education,⁶³ for which states receive federal money. Other national benchmarks are set out not in laws but in the standards that education associations and experts have developed and found to be essential for educational adequacy in discrete areas.⁶⁴ Respected organizations with specific expertise have also developed baseline norms in a broad array of educational areas that can guide a court in assessing educational adequacy.⁶⁵

This Part surveys some of these national standards and examines the ways in which the Alabama court employed them in its analysis. In *Harper*, the plaintiffs produced evidence of national standards in a variety of areas. Some standards, such as those relating to school buses,⁶⁶ were demonstrated either

62. "Chapter 1" refers to Title I of the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. § 2701 (1988)). Congress enacted Chapter 1 "[i]n recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs." § 201, 79 Stat. at 27. Congress has recently adopted amendments to Chapter 1, which took effect on July 1, 1995. See Improving America's Schools Act of 1994, Pub. L. No. 103-382, §101, 108 Stat. 3519. For a discussion of how Chapter 1 standards can promote greater educational equity and program adequacy, see COMMISSION ON CHAPTER 1, MAKING SCHOOLS WORK FOR CHILDREN IN POVERTY: A NEW FRAMEWORK (1992).

63. See *infra* notes 77-83 and accompanying text.

64. See, e.g., AMERICAN ASS'N OF SCH. ADMINISTRATORS, SCHOOLHOUSE IN THE RED: A GUIDEBOOK FOR CUTTING OUR LOSSES 12-19 (1992) (defining a model of indoor air quality and energy efficiency for schools); AMERICAN PSYCHOLOGICAL ASS'N, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING (1985) (setting forth standards for educational and psychological testing); President George Bush and National Governor's Association, Joint Statement at the President's Education Summit with Governors at the University of Virginia (Sept. 27-28, 1989) (unpublished statement, on file with the *University of Michigan Journal of Law Reform*) (calling for "a defined set of national education goals").

65. See *infra* Part II.C.

66. For examples of school transportation standards, see 49 U.S.C. §§ 2701-18 (1988 & Supp. V 1993) (establishing national requirements with respect to school bus safety); 49 C.F.R. § 571.222 (1994) (establishing school bus seating and crash protection standards); 60 Fed. Reg. 15,504 (1995) (to be codified at 49 C.F.R. § 571)

through federal laws, written guidelines distributed by federal bodies, or regional professional organizations. Other standards, such as the critical elements of programs to teach students from disadvantaged socioeconomic backgrounds, were shown through expert studies and the testimony of nationally recognized educators.

A. The State Constitution

As a threshold matter, advocates looking to national input standards must establish that a state constitution's educational mandate goes beyond the specific and limited standards found in a state's own laws and regulations. As previously noted, the *Harper* court easily recognized that the state constitutional guarantee of a "liberal" education is not confined to the discrete standards of Alabama statutes and rules.⁶⁷ Instead, the court held that section 256 of the Alabama Constitution, requiring "not only the 'establishment,' but also the 'organization' and 'maintenance' of a 'system' of public schools 'throughout the state,'" created a continuing obligation on the part of the state to maintain a public school system that meets "evolving educational standards"⁶⁸ and that prepares students to function and compete at national and international levels.⁶⁹

State courts in education reform cases outside of Alabama have interpreted state constitutional provisions similarly to guarantee an education that is adequate in the context of evolving national and professional standards. For example, the Supreme Judicial Court of Massachusetts held that "[t]he content of the duty to educate which the [state] Constitution places on the Commonwealth necessarily will evolve together with our society."⁷⁰ Similarly, the Supreme Court of Washington found

(amending the definition of "designated seating position" with regard to school transportation vehicles); see also Donna Harrington-Lueker, *Special Buses: It's Up to Local Boards to Regulate Transportation for Special Education*, AM. SCH. BD. J., Apr. 1991, at 27 (discussing the absence of national school bus standards for children with disabilities); Andrew Trotter, *School Bus Safety: School Buses, Already the Safest Way to Go, Can Be Made Safer Still*, AM. SCH. BD. J., Nov. 1989, at A4 (discussing ways to make school busses safer).

67. See *Harper Opinion*, *supra* note 12, at 146-48.

68. *Id.* at 153-54 (quoting ALA. CONST. art XIV, § 256 (amended 1956)).

69. See *id.* at 166.

70. *McDuffy v. Robertson*, 615 N.E.2d 516, 555 (Mass. 1993).

that a court interpreting a state constitutional education clause "must *interpret* the constitution in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its original meaning. . . . Consequently, the State's constitutional duty goes beyond mere reading, writing and arithmetic."⁷¹ Decisions such as these can provide advocates and policymakers with powerful support for looking beyond a state's own statutory or regulatory standards for the definition of program adequacy.

B. Federal Education Input Standards

Federal statutory and administrative law can help to define in greater detail the contours and content of an adequate education. Of course, no general federal statute governs input standards of educational quality in state public schools. Nor does federal case law—whether derived from the common law or from constitutional principles—provide a source of general educational norms. Federal education input standards are instead located in an array of statutes and administrative regulations, and they tend to reflect specific policy concerns in discrete areas of an educational program. Despite the variety of sources and substantive areas, advocates should not underestimate the power and breadth of federal input standards in state constitutional adequacy cases. Federal laws currently set forth comprehensive standards "in such areas as adult education, vocational and technical education, multicultural education, special education, science education, [and] foreign language education."⁷² Federal laws also provide standards in related areas such as building quality, asbestos cleanup, school breakfasts, and teacher recruitment.⁷³

In Alabama, federal law played a significant role in providing the *Harper* court with guidance on the meaning of educational adequacy. As discussed above, the Alabama Education Improvement Act of 1991 called for a broad range of educational standards in highly selected areas.⁷⁴ In some of these areas, the Act

71. *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 94 (Wash. 1978).

72. H.C. HUDGINS, JR. & RICHARD S. VACCA, *LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS* § 1.4, at 7 (3d ed. 1991).

73. *See id.*

74. *See supra* Part I.B.

explicitly contemplated that its mandate would be interpreted by reference to federal law. For example, in the area of school transportation, the Act required that all school systems "[c]omply with the requirements of [the] federal . . . government[] and agencies . . . with respect to the condition and safety of vehicles, scheduling of routes, training and licensing of drivers and load capacity of buses."⁷⁵ The *Harper* court expressly relied on recommendations of the National Transportation Safety Board that all school buses built before 1978 be removed from service.⁷⁶

Federal law played a more prominent role for the *Harper* court in the area of special education.⁷⁷ The federal government has enacted broad statutory mandates providing a framework for the operation of public schools in the area of special education.⁷⁸ Dr. Martha E. Snell⁷⁹ and Dr. David J. Rostetter,⁸⁰ both

75. See ALA. CODE § 16-3-18.4(c)(2) (Supp. 1994).

76. *Harper Opinion*, *supra* note 12, at 136 (noting that Alabama schools were using buses that failed to meet national safety standards).

77. In January 1991, the court granted the motion of the Alabama Disabilities Advocacy Program and John Doe, a student with disabilities, to intervene as plaintiffs on behalf of a proposed class of similarly situated children. See *id.* at 111; Order at 2, *Alabama Coalition for Equity, Inc. v. Hunt*, No. CV-90-883 (Ala. Cir. Ct. Montgomery County Jan. 9, 1991) (on file with the *University of Michigan Journal of Law Reform*). Plaintiff-intervenors raised both constitutional and statutory challenges to the system's treatment of children with disabilities. See Plaintiff-Intervenor's Pre-Trial Brief at 6-8, *Alabama Coalition for Equity* (Nos. CV-90-883-R, CV-91-0117-R) (on file with the *University of Michigan Journal of Law Reform*). In July 1992, the court certified a plaintiff subclass of all schoolchildren in Alabama ages 3 through 21 years with identified disabilities. See *Harper Opinion*, *supra* note 12, at 111.

78. See Individuals with Disabilities Act (IDEA), 20 U.S.C. § 1400 (Supp. V 1993) (setting forth the federal requirement that all state public schools provide a "free appropriate public education" for all handicapped children between the ages of 3 and 21); see also Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (1988) (mandating that "[n]o otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"); Americans with Disabilities Act, 42 U.S.C. § 12101 (Supp. V 1993) (prohibiting discrimination in services against persons with disabilities by state or local government).

79. Dr. Snell is currently Professor of Education at the University of Virginia, Curry School of Education. She has authored or co-authored more than 80 articles and book chapters. She also served as a member of a court-appointed panel of experts in a federal special education case and has served as a consultant and expert witness in more than a half-dozen court cases (*curriculum vitae* on file with *University of Michigan Journal of Law Reform*).

80. Dr. Rostetter is currently an independent education consultant and President of Education Policy and Program Solutions. He has served as a consultant or expert witness in more than a dozen court cases. He also has reviewed the special education programs of all 50 states and written the manual used by the federal government in

special education experts, testified about standards of education program adequacy in this area. Dr. Snell identified seven essential components of an appropriate education for children with disabilities: (1) inclusion, (2) program support, (3) curriculum, (4) instruction, (5) peer support, (6) preparation for adult life, and (7) collaborative teaming.⁸¹ These components draw upon principles and assumptions established in federal case law in the area of special education.⁸² The court accepted these expert standards as a benchmark for program adequacy and found that the state had failed to comply with them.⁸³

C. Professional Education Input Standards

National education input standards for program adequacy can be found in the guidelines and pronouncements of nationally recognized professional organizations. These standards may cover a broad range of topics and frequently are more specific or inclusive than state analogues. For example, the *Harper* court looked to standards of the Southern Association of Colleges and Schools (Southern Association), a private regional accreditation body that reviews schools throughout the South, as a complement to the state's own accreditation system.⁸⁴ Accreditation under these standards is reported as part of the annual status

monitoring state-based special education programs (*curriculum vitae* on file with the *University of Michigan Journal of Law Reform*).

81. See *Harper Opinion*, *supra* note 12, at 141.

82. See *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982) (defining an appropriate education as one that is "reasonably calculated to enable the child to receive educational benefits"); *Timothy W. v. Rochester Sch. Dist.*, 875 F.2d 954, 973 (1st Cir.) (holding that a school had a duty to develop an individualized education program "geared to each child's individual needs"), *cert. denied*, 493 U.S. 983 (1989).

83. See *Harper Opinion*, *supra* note 12, at 141-43. The court gave weight to a five-day field survey of special education programs throughout Alabama conducted by Dr. Snell, Dr. Rostetter, and a graduate student. The researchers visited schools in 10 school systems, including low-wealth and high-wealth districts. *Id.* at 141. Dr. Snell also spent one week observing students with disabilities and the programs provided to them. *Id.* In her testimony, Dr. Snell emphasized that the measure of a program's adequacy "is the outcome for [a] particular child." *Id.* at 142. In its analysis, the court found significant "the complete absence" of programs needed to prepare children with disabilities for adult life. *Id.* The testimony of Dr. Snell and of Dr. Rostetter was corroborated by state officials responsible for the administration of special education programs in Alabama. *Id.*

84. *Id.* at 127.

reports.⁸⁵ In considering the Southern Association standards, the court was influenced by testimony of the Governor that, to be adequate, each school in Alabama should “measure up to the standards of the Southern Association of Colleges and Schools.”⁸⁶ In addition, the Governor’s chief education advisor testified that schools in Alabama are not adequate if they do not meet the accreditation standards of the Southern Association.⁸⁷ These Southern Association accreditation standards address many of the areas covered by the state’s accreditation process but are more specific in certain instances. Among the educational issues that the Southern Association standards address are school facilities, instructional personnel, guidance programs, health services, and class size.⁸⁸ In its decision, the court specifically referred to the Southern Association standards in a number of areas, such as school facilities, guidance services, and library services.⁸⁹ In these areas, the Southern Association standards provide the following:

- *School Facilities.* The Southern Association standards require that all schools provide appropriate classrooms that are “spacious, safe, functional, . . . and appropriately equipped for varied instructional programs.”⁹⁰
- *Guidance Services.* The Southern Association standards require that all schools provide “[a]n organized program of guidance . . . to assist students in assessing educational alternatives, selecting appropriate educational activities,

85. See *id.*

86. *Id.*; see also Deposition of Governor Guy Hunt at 35, *Alabama Coalition for Equity* (Nos. CV-90-883-R, CV-91-0117-R) [hereinafter *Hunt Deposition*] (testifying to the same) (on file with the *University of Michigan Journal of Law Reform*).

87. *Harper Opinion*, *supra* note 12, at 127.

88. See COMMISSION ON ELEMENTARY SCH., SOUTHERN ASS’N OF COLLEGES AND SCH. POLICIES, PRINCIPLES & STANDARDS FOR THE ACCREDITATION OF ELEMENTARY AND MIDDLE SCHOOLS 31 (1990–1991) [hereinafter *ELEMENTARY STANDARDS*] (school facilities); COMMISSION ON ELEMENTARY SCH., SOUTHERN ASS’N OF COLLEGES AND SCH. POLICIES, STANDARDS FOR UNIT SCHOOLS 11–12, 15, 20–22 (1991) [hereinafter *UNIT STANDARDS*] (school facilities, instructional personnel, guidance programs, and health programs); COMMISSION ON ELEMENTARY SCH., SOUTHERN ASS’N OF COLLEGES AND SCH. POLICIES, STANDARDS OF THE COMMISSION ON SECONDARY SCHOOLS 8, 9–12, 14–16 (1986) [hereinafter *SECONDARY STANDARDS*] (school facilities, instructional personnel, guidance programs, health standards, and class size).

89. *Harper Opinion*, *supra* note 12, at 128–29.

90. *ELEMENTARY STANDARDS*, *supra* note 88, at 32.

evaluating their progress, making intelligent occupational choices, and selecting sound courses of action for their lives.”⁹¹

- *Library Services.* The Southern Association standards require public school libraries to be “adequate in quantity, quality, and type to assure the breadth and depth in learning necessary for the development of academic skills, vocational competencies, and personal growth.”⁹²

The *Harper* court accepted the fact that many Alabama schools “come up short under these professionally recognized standards” as evidence of program inadequacy.⁹³ Moreover, the wealth of a school district related positively to its ability to meet Southern Association standards.⁹⁴

D. Expert Research on Input Adequacy

In addition to published professional benchmarks, the *Harper* court looked to the testimony and published reports of education experts to establish or elaborate upon input standards in specific program areas.⁹⁵ In considering the special issues surrounding the provision of an adequate education for students from disadvantaged socioeconomic backgrounds, the *Harper* court paid special attention to studies and recommendations of national experts with knowledge in this particular area.

For example, Dr. Robert E. Slavin, Director of the Early and Elementary School Program at the Center for Research on Effective Schooling for Disadvantaged Students at Johns Hopkins University,⁹⁶ gave expert testimony about educational

91. UNIT STANDARDS, *supra* note 88, at 11.

92. SECONDARY STANDARDS, *supra* note 88, at 12.

93. *Harper Opinion*, *supra* note 12, at 127. The court did not see the Southern Association standards as defining the contours of an adequate education but rather as providing additional evidence of inadequacy. *See id.* In some respects, these standards themselves may not have kept pace with evolving notions of educational adequacy.

94. *See id.* One expert testified at trial that he considered some schools in Alabama's poorer school districts to be “second world facilities.” *Id.* at 126.

95. *See id.* at 133.

96. Dr. Slavin has authored or co-authored more than 140 articles and 12 books. *See, e.g., infra* note 98. For a summary of his proposed testimony, see Telephone Deposition of Robert E. Slavin, *Alabama Coalition for Equity* (Nos. CV-90-883-R,

programs and practices that have been demonstrated to have a positive impact on the achievement of economically disadvantaged students.⁹⁷ These programs and practices⁹⁸ include:

- *Early Childhood Programs.* Research on prekindergarten programs has found a positive effect on the language and cognitive measures of disadvantaged children that improves their chances of high school graduation.
- *Tutoring.* One-to-one tutoring programs have had demonstrated success in ensuring success in first grade reading, and Reading Recovery⁹⁹ could serve as a model program.
- *Success for All.* This comprehensive program combines several different features, including prekindergarten and kindergarten, one-to-one tutoring, cooperative learning methods, and family support, to ensure "success for all" in the elementary grades.
- *Staff Development.* A comprehensive program of professional development, one that incorporates elements of programs and practices known to be effective in the education of disadvantaged children, is a crucial and cost-effective method of improving the achievement of at-risk students.¹⁰⁰

CV-91-0117-R) [hereinafter Slavin Deposition] (on file with the *University of Michigan Journal of Law Reform*).

97. None of the testimony at trial was transcribed, including the testimony of Dr. Slavin.

98. For descriptions and analysis of these and other programs, see ROBERT E. SLAVIN ET AL., *SUCCESS FOR ALL: A RELENTLESS APPROACH TO PREVENTION AND EARLY INTERVENTION IN ELEMENTARY SCHOOLS* (1992) [hereinafter *SUCCESS FOR ALL*]; ROBERT E. SLAVIN ET AL., *EFFECTIVE PROGRAMS FOR STUDENTS AT RISK* (1989); Robert E. Slavin, *Statewide Finance Reform: Ensuring Educational Adequacy for High Poverty Schools* (Sept. 1993) (unpublished manuscript, on file with the *University of Michigan Journal of Law Reform*).

99. See *infra* note 201 and accompanying text.

100. Even though the *Harper* court did not refer specifically to the testimony of Dr. Slavin, the testimony played a valuable role in at least two respects. First, it responded specifically to the state's contention that money does not affect the quality of a child's public schooling or his or her achievement. See *Harper Opinion*, *supra* note 12, at 140; *infra* note 182 and accompanying text. Dr. Slavin's description of effective programs persuasively suggested that money wisely spent on educational opportunities can have a profound effect on student outcomes. See Slavin Deposition, *supra* note 96, at 9-15. Second, Dr. Slavin's testimony provided an important remedial predicate, establishing the need for funds and training to establish and maintain effective programs for disadvantaged students. See *Remedy Order*, *supra* note 15, at 11-12.

E. National Standards of Relative Adequacy

A final measure of a state's program adequacy is its position compared to other states with respect to certain indicators. These indicators are quantitative and relate to matters such as revenues and expenditures, enrollment and attendance, and personnel and certification of faculty.¹⁰¹ Without a baseline norm, rank-ordered statistics provide a standard of only relative, and not absolute, program adequacy. Such rankings, however, are an important piece of adequacy analysis. In particular, they offer powerful evidence in assessing local educational conditions.

The National Education Association (NEA) currently ranks every state in terms of factors such as instructional staff salary, school revenue, and per capita expenditures.¹⁰² The NEA has collected and reported such data since the 1960s,¹⁰³ and these rankings provide a significant longitudinal picture of how a state's educational system compares to those of other states. In Alabama, the state's Department of Education also has undertaken a series of rank-ordered analyses to determine the relative adequacy of aspects of the state's public school system.¹⁰⁴ The *Harper* court gave special weight to one such report, which found that, in 1986–1987, Alabama ranked last in the Southeast and last in the nation in per capita spending on education;

101. Relative indicators are published by a number of national and regional professional organizations. See, e.g., COUNCIL OF THE GREATER CITY SCH., NATIONAL URBAN EDUCATION GOALS: 1992–93 INDICATORS REPORT (1994) (collecting data on the conditions, characteristics, and achievements of urban schools, including: (1) readiness-to-learn indicators, such as nursery school enrollment, infant mortality, and child care programs for infants of teen mothers; (2) graduation rates; (3) academic achievement; (4) teacher quality, such as shortages, salary, and pupil/teacher ratios; (5) post-secondary opportunities; and (6) funding); NATIONAL CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS (1993) (collecting statistical information on a broad range of categories, including the number of schools and colleges, teachers, student enrollment, educational achievement, employment and income of graduates, and international education); NATIONAL CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION (1993) (collecting statistical information on access, achievement, economic outcomes, and financial resources available for education).

102. See, e.g., NATIONAL EDUC. ASS'N, RANKINGS OF THE STATES (1991) (providing rankings by state in the areas of population, enrollment, attendance, revenue and resources).

103. *Id.* at 2.

104. See, e.g., STATE DEP'T OF EDUC., THE CONDITION OF EDUCATION IN ALABAMA: THE RELATIONSHIP BETWEEN FINANCING EDUCATION AND STUDENT ACHIEVEMENT (1989).

the court adopted the report's conclusion that "Alabama has failed to adequately finance its public school system."¹⁰⁵

III. EDUCATION ACHIEVEMENT OR OUTPUT STANDARDS

A third source of guidance in assessing educational adequacy is the body of state and national achievement, or output, standards that has emerged on an array of educational subjects and skills.¹⁰⁶ These standards are contained in a variety of sources. For example, most states have developed specific standards for student performance and behavior in areas such as attendance, test or assessment measures, and readiness for college-level work.¹⁰⁷ In addition, national education output standards have emerged in areas such as dropout rates and preparation for higher education and employment.¹⁰⁸

This Part examines some of the main sources of state and national achievement, or output, standards and how they may be used by a court assessing its state's educational adequacy. It describes the specific ways in which the *Harper* court looked to standards of this kind in its evaluation of the adequacy of the Alabama public schools.

A. *The State Constitution*

In Alabama, the importance of output standards as a measure of educational adequacy was obvious given the *Harper* court's interpretation of the state constitution's education clause. Relying upon the constitution's text and history, as well as upon judicial decisions based on similar clauses in

105. See *Harper Opinion*, *supra* note 12, at 138 (quoting STATE DEP'T OF EDUC., ALABAMA WHERE DO WE STAND? A COMPARATIVE VIEW OF KEY EDUCATIONAL AND FINANCIAL STATISTICS 25 (1989)).

106. See MARGOLIS & MOSES, *supra* note 18, at 12 (defining outputs as "a variety of behavioral measures related to student achievement that may include test scores, promotion, school completion and special forms of distinction").

107. See generally MARGARET E. GOERTZ, EDUC. TESTING SERV., STATE EDUCATIONAL STANDARDS: A 50-STATE SURVEY (1986) (identifying and describing state standards in each of the fifty states).

108. See *infra* notes 120-22, 126, 131 and accompanying text.

other state constitutions, the *Harper* court concluded that an adequate education is one that prepares students for the "responsible duties of life."¹⁰⁹

The court accepted the common sense proposition that "[a]dequacy connotes sufficiency for a purpose or requirement."¹¹⁰ Noting that "the essence of plaintiffs' adequacy claim is that the state education system fails to meet the standards or achieve the purposes of public education mandated by the Alabama Constitution,"¹¹¹ the court found that both the text and the history of the education clause of the 1901 Alabama Constitution "obligates the state to provide its children with an education that will *in fact* benefit them by offering them appropriate preparation for the responsible duties of life."¹¹² Similarly, in interpreting the due process guarantees of the Alabama Constitution as requiring the state to provide an adequate education, the court emphasized that "the purpose of depriving students of their liberty by mandating school attendance is to educate them."¹¹³

B. State Achievement or Output Standards

For standards of program adequacy, advocates and courts can turn to a state's own education output or achievement standards as one measure of performance. For example, the Alabama Education Improvement Act of 1991 called for a performance-based accreditation system incorporating output-based standards, such as test scores and graduation and dropout rates, along with more traditional input-driven accreditation standards, such as a required curriculum, adequate facilities and instructional resources, and a minimum teacher training level.¹¹⁴ Although the performance-based accreditation system developed by the State Department of Education and adopted

109. See *Harper Opinion*, *supra* note 12, at 154.

110. *Id.* at 126.

111. *Id.*

112. *Id.* at 154. The court embraced a definition of adequacy that focused on enabling students to function at national and international levels. *Id.* at 166.

113. *Id.* at 161 (citation omitted). The court embraced a definition of adequacy that focused on enabling students to function and compete at national and international levels. See *id.* at 166.

114. See ALA. CODE § 16-3-18.4 (Supp. 1994).

by the State Board of Education was never funded¹¹⁵ or fully implemented, the court looked to it as one source of output standards which could be used in assessing program adequacy.¹¹⁶

The court's opinion credited trial testimony that not a single local school system in the state met all the new accreditation requirements.¹¹⁷ Indeed, in some individual systems the deficiencies were particularly stark. Discussing performance on statewide mathematics tests, the court noted that "in one school system, *no* students obtained adequate or proficient scores on the most recent Algebra I exam, which is part of the performance component of Performance-Based Accreditation."¹¹⁸

C. Nationally Recognized Output Standards

In addition to these specific state output standards, the court made detailed findings concerning three output indicators that have been recognized at both the state and the national levels: dropout rates, preparation for higher education, and overall preparation for the workforce.¹¹⁹

1. *Dropout Rates*—One of the national education goals, now codified as part of the Goals 2000: Educate America Act (Goals 2000),¹²⁰ is that all schools in America by the twenty-first century should have a graduation rate of at least ninety percent.¹²¹ This is a powerful benchmark to point to in assessing the adequacy of a state public school system from the

115. See *Harper Opinion*, *supra* note 12, at 127 n.25. Section 25 of the Education Improvement Act of 1991 provided that "[a]ny and all mandates contained in the provisions of this act shall be mandated only to the extent that funds are appropriated or otherwise made available for the purposes of implementing such mandate." 1991 Ala. Acts 602, 642.

116. *Harper Opinion*, *supra* note 12, at 128–29.

117. *Id.* at 128.

118. *Id.*

119. *Id.* at 137–38. The court did not base its consideration of these output standards on their national recognition but the evidence it credited included national and regional comparisons.

120. 20 U.S.C.A. § 5801 (West Supp. 1991–1994).

In the Alabama Education Improvement Act of 1991, the Alabama Legislature recognized six state goals for the year 2000 that were modeled on six goals that had been established by President Bush and the nation's governors. See § 2, 1991 Ala. Acts 602, 607. These goals are substantially the same as six of the goals codified in Goals 2000. See 20 U.S.C.A. § 5812. In September 1995, Alabama's new Governor returned money that the state had received under Goals 2000. See Anne Sclater, *State Won't Keep Funds for Schools*, MONTGOMERY ADVERTISER, Sept. 29, 1995, at 1A.

121. See 20 U.S.C.A. § 5812(2).

perspective of retention and dropout rates.¹²² In the Alabama case, evidence of dropout rates came in affidavit testimony from Dr. William Spencer, a professor at Auburn University, who conducted a dropout study that compared Alabama to other states.¹²³ Dr. Spencer ranked Alabama forty-ninth among the fifty states in its ability to graduate students after twelve years of public education.¹²⁴ Defendant Governor Hunt conceded that the state's dropout rate was about thirty-five percent, placing it among the highest in the nation.¹²⁵

2. *Preparation for Higher Education*—Two additional national output measures that relate to the adequacy of an education system require that all children in the United States become proficient in a wide range of academic subject matters and that they rank first in the world in math and science.¹²⁶

122. The objectives for school dropout rates are as follows:

- (i) the Nation must dramatically reduce its school dropout rate, and 75 percent of the students who do drop out will successfully complete a high school degree or its equivalent; and
- (ii) the gap in high school graduation rates between American students from minority backgrounds and their non-minority counterparts will be eliminated.

Id. § 5812(2)(B).

123. See *Harper Opinion*, *supra* note 12, at 136. Dr. Spencer is the former chair, and currently a Professor, of the Department of Educational Foundations, Leadership, and Technology at Auburn University. He has authored or co-authored a total of more than 20 articles and papers on education-related subjects. In 1986, he directed the Alabama High School Dropout Study, through a grant funded by the Governor's Office, State of Alabama (*curriculum vitae* on file with the *University of Michigan Journal of Law Reform*).

124. *Harper Opinion*, *supra* note 12, at 136; see also William Spencer & Lisa Bearden, *Dropouts in Alabama: Findings of a Statewide Survey*, 8 URB. EDUCATOR 65 (1987).

125. Hunt Deposition, *supra* note 86, at 57.

126. The relevant sections of the statute (Goals 2000) read as follows:

- (3) Student achievement and citizenship.
 - (A) By the year 2000, all students will leave grades 4, 8, and 12 having demonstrated competency over challenging subject matter including English, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography, and every school in America will ensure that all students learn to use their minds well, so they may be prepared for responsible citizenship, further learning, and productive employment in our Nation's modern economy. . . .
- (5) Mathematics and science
 - (A) By the year 2000, United States students will be first in the world in mathematics and science achievement.

The *Harper* court credited expert affidavit testimony describing the alarmingly high percentage of Alabama public school students who were required to take remedial courses when they arrive at college.¹²⁷ James E. Purcell, Director of Matriculation and Retention at Shelton State Community College, which serves a seven-county region in western Alabama, testified that eighty-two percent of the school's incoming students must take remedial math courses, while sixty-eight percent were required to take remedial English and sixty-four percent were required to take remedial reading classes.¹²⁸ Dr. Ira Harvey, a professor at the University of Alabama at Birmingham, added to this evidence with testimony that his university's professional schools must rely on out-of-state recruiting to attract sufficient numbers of qualified students.¹²⁹ Again, the Governor's own deposition testimony provided further evidence of the system's glaring deficiencies in the preparation of students for higher education. The opinion quotes the Governor as saying that "more than [forty] percent of *all* of Alabama's graduating high school seniors need some kind of remediation before they can begin college-level work."¹³⁰

3. *Preparation for the Workforce*—Ensuring that every adult is able to compete in the workforce is another objective of Goals 2000.¹³¹ Having concluded that the Alabama Constitution requires that students be prepared for the responsible duties of life, the *Harper* court focused on student preparation for the workforce as another performance-based indicator to establish the inadequacy of the Alabama public school system. The Vice Chancellor for External Affairs at the University of Alabama and several of the state's most prominent business leaders presented testimony that the public school system failed to equip students with the skills necessary to compete in today's economy and that this failure adversely affects state economic development and hampers efforts to recruit business to the state.¹³² Those witnesses attributed the state's failure to attract

127. *Harper Opinion*, *supra* note 12, at 137.

128. *Id.* For the report Mr. Purcell relied upon, see SHELTON STATE COMMUNITY COLLEGE, NEW STUDENT REPORT (Fall 1991).

129. *Harper Opinion*, *supra* note 12, at 119, 137.

130. *Id.* at 137.

131. See 20 U.S.C.A. § 5812(6) (West, Supp. 1991-1994).

132. *Harper Opinion*, *supra* note 12, at 137. There is a growing literature on the quality of schooling and its relation to economic returns on education. See, e.g., David Card & Alan B. Krueger, *Does School Quality Matter? Returns to Education and the Characteristics of Public Schools in the United States*, 100 J. POL. ECON. 1 (1992)

the Saturn automobile manufacturing plant in part to a poor perception of Alabama's schools.¹³³ The Governor conceded that Alabama schools were producing large numbers of students who were not prepared to enter the workforce, including students who cannot read.¹³⁴ He acknowledged that a steel corporation in Gadsden, Alabama had announced its refusal to continue hiring local graduates because seventy percent of them tested below the eighth grade level in reading.¹³⁵

Finally, the court also received expert affidavit testimony from Alan B. Krueger, Professor of Economics and Public Affairs at the Department of Economics and Woodrow Wilson School at Princeton University. Dr. Krueger testified that "a full measure of the adequacy of Alabama's public schools should look at student labor market success."¹³⁶ In addition, he testified that his empirical research shows that a student's earnings later in life correlate directly to the quality of schools in which she was educated, where quality is measured by the average pupil-teacher ratio and the average salary of teachers.¹³⁷

IV. USING STATE AND NATIONALLY RECOGNIZED STANDARDS AS BENCHMARKS FOR PROGRAM ADEQUACY

A concern about education reform litigation based on adequacy principles is that such reform may be unworkable in practice. Because judges are not education experts, some policymakers and commentators contend that courts will have

(finding a positive correlation between school quality and earnings). Each year, the Corporation for Enterprise Development publishes a *Report Card for the States* which grades the states on a number of economic and quality of life indicators, including commitment to educational quality. See, e.g., CORPORATION FOR ENTER. DEV., THE 1990 DEVELOPMENT REPORT CARD FOR THE STATES 56 (1990).

133. *Harper Opinion*, *supra* note 12, at 137; see *Disappointed by Saturn, Alabama Officials Look to Japan*, UPI, July 26, 1985, available in LEXIS, News Library, Arcnews File; *Regional News*, UPI, Oct. 11, 1985, available in LEXIS, News Library, Arcnews File ("Alabama has a poor image that is attributable to the state's low education ranking and high unemployment . . ."). See generally Dennis S. Tosh et al., *Industrial Site Selection Criteria: Are Economic Developers, Manufacturers and Industrial Real Estate Brokers Operating on the Same Wave Length?*, ECON. DEV. REV., Fall, 1988, at 62 (discussing the role of quality of life variables in site selection).

134. See Hunt Deposition, *supra* note 86, at 58.

135. *Id.*

136. Affidavit of Alan B. Krueger at 2, *Alabama Coalition for Equity* (Nos. CV-90-883-R, CV-91-0117-R) (on file with the *University of Michigan Journal of Law Reform*) (curriculum vitae on file with the *University of Michigan Journal of Law Reform*).

137. *Id.* at 7.

difficulty articulating suitable standards of educational adequacy and applying those standards appropriately.

As the previous Parts of this Article have shown, judicially manageable standards for determining educational adequacy do exist, and courts can use them in judging whether public schools are providing children with adequate educational opportunities. This Part discusses how courts can apply such standards to make decisions about the adequacy of particular educational systems. It will use as its model the liability phase analysis of the *Harper* court, which applied standards of the kind discussed in the previous Parts to make a determination that the Alabama public school system was legally inadequate.

A. Using State and Nationally Recognized Input Standards

In *Harper*, state input standards provided an important evidentiary tool for considering the question of program adequacy.¹³⁸ State input standards often have the advantage of breadth and depth, and they can cover most aspects of educational programs in considerable detail. These standards also carry a certain measure of democratic approval, having been established through supposedly majoritarian processes. Nevertheless, courts should not feel constrained by these standards when interpreting educational rights, because political pressure may result in underenforcement of constitutional norms.

The *Harper* court illustrated the method by which state input standards can be used as a starting point in making an adequacy determination. In the adequacy section of its decision, the court first collected standards from a broad range of state and non-state sources and then reviewed the evidence presented at trial to find that the Alabama schools systematically fell short of these standards.¹³⁹

The *Harper* court used adequacy standards for school facilities in a typical fashion. It collected standards from state statutes and regulations, such as the Alabama Education Improvement Act of 1991, *Performance-Based Accreditation Standards*,¹⁴⁰ *A Plan for Excellence*, and other sources.¹⁴¹ For

138. See *supra* Part I.

139. *Harper Opinion*, *supra* note 12, at 127-36.

140. *Supra* note 41.

141. See *Harper Opinion*, *supra* note 12, at 128-29.

example, the court relied on state standards mandating that all schools have "facilities conducive to an effective teaching and learning environment, including safe buildings having adequate space, heating and air conditioning."¹⁴² The court then compared the evidence about facilities presented at trial with these standards.¹⁴³ The court's discussion of school facility conditions in Alabama is a checklist of horrors: a school so overcrowded that teachers were forced to hold a math class in a vocational education building where the sound of power tools drowned out the lesson, leading students to wear radio headphones to muffle the noise;¹⁴⁴ a high school that did not have a single science laboratory;¹⁴⁵ classrooms without lights;¹⁴⁶ a school without drinkable water;¹⁴⁷ and an elementary school whose main playing field was contaminated with large dark spots formed by raw sewage leaked from the school's broken septic tank.¹⁴⁸

The court went on to make similar comparisons between standards and evidence in other areas: staffing standards were compared with the evidence of widespread staff shortfalls;¹⁴⁹ curriculum standards were compared with the evidence of schools that cannot offer many important courses;¹⁵⁰ textbook standards were compared with the evidence of book shortages, outdated books, and books with missing pages;¹⁵¹ equipment and supply standards were compared with the evidence of minuscule supply budgets and widespread shortages of critical equipment;¹⁵² and transportation standards were compared with the evidence of a lack of funding to replace unsafe buses and bus rides of over 100 miles and lasting up to five hours.¹⁵³ The court concluded that "the evidence is compelling that many Alabama schools fall below standards of minimal educational adequacy for facilities, curriculum, staffing, textbooks, supplies and equipment, and transportation that have been adopted by the state itself."¹⁵⁴

142. See *id.* at 128 (quoting the Alabama Education Improvement Act of 1991, 1991 Ala. Acts 602, 620).

143. See *id.* at 129-31.

144. *Id.* at 129.

145. *Id.*

146. See *id.* at 130.

147. See *id.*

148. *Id.*

149. *Id.* at 132-33.

150. *Id.* at 131-32.

151. *Id.* at 134-35.

152. *Id.* at 135-36.

153. *Id.* at 136.

154. *Id.*

State law input standards have certain advantages and some disadvantages as guidelines for assessing educational adequacy. The first advantage that they may bring relates to comprehensiveness. They can present standards for a court to use in considering numerous aspects of an educational program. As the *Harper* decision demonstrates, state standards are generally broad enough and deep enough to provide guidance in a wide range of areas.

A second advantage is that these standards are state-specific. The United States traditionally has tended to regard defining the specifics of education as a local function.¹⁵⁵ In part, this tendency is based on a belief that different people and different geographical regions may have somewhat different views about education.¹⁵⁶ The tendency is based also on a view that it is appropriate to keep educational decision making close to the parents whose children are being educated.¹⁵⁷

The Alabama standards, in some cases, address problems that are unique, or at least of special concern, to the Alabama school systems. For example, *A Plan for Excellence* recommended that schools offer to all students the opportunity to pursue college preparatory courses¹⁵⁸ because Alabama had a history of not offering a college-preparatory curriculum at some high schools.¹⁵⁹ In addition, the specific recommendation in *A Plan for Excellence* that students should not be required to attend school in facilities where "the temperature is dangerously hot"¹⁶⁰ is particular to Alabama, where the climate during the spring and early fall semesters is such that students in many parts of the state cannot reasonably be expected to learn in classrooms without air conditioning.

A third advantage that state standards have is that these standards all emerge in some way from the political processes within the state. State constitutions are the product of state

155. Cf. Richard Briffault, *On Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 24–39 (1990) (discussing the tension between states and localities for control over school finance).

156. See JAMES D. KOERNER, WHO CONTROLS AMERICAN EDUCATION?: A GUIDE FOR LAWYERS 118 (1968) (discussing the existence of 23,335 basic administrative public school units in 1966–1967 and the wide diversity among them).

157. See generally Tyll van Geel, *The Prisoner's Dilemma and Education Policy*, 3 NOTRE DAME J.L. ETHICS & PUB. POL'Y 301 (1988) (discussing the constitutional right of parents to control their children's education).

158. PLAN FOR EXCELLENCE, *supra* note 41, at 43.

159. See *Harper Opinion*, *supra* note 12, at 132.

160. PLAN FOR EXCELLENCE, *supra* note 41, at 91.

constitutional conventions.¹⁶¹ State statutes are produced by the legislative branch. Administrative law is promulgated by the executive branch, by officers answerable to the governor or to another directly elected entity, such as a state board of education.

Yet state statutory or regulatory input standards are also accompanied by a number of limitations that underscore the latent danger in allowing legislatively enacted norms to shape constitutional mandates. First, state standards necessarily will contain a certain degree of inconsistency simply because they were not developed at one time by one deliberative body. In Alabama, for example, the different state standards do not agree precisely on what are acceptable maximum class sizes or staff-student ratios.¹⁶²

As a result, courts relying on state standards may need to choose among different sets of standards or else regard the entire group of standards collectively as evidence that a state fails to meet any of them. For example, the *Harper* court did not attempt to set out precise maximum class sizes or staff-student ratios. After looking at the standards and the evidence, however, the court concluded that "Alabama schools have serious shortages of educational staff" and provided specific examples of staffing inadequacy.¹⁶³ The task of developing more detailed standards was left for the remedy phase in order to afford the coordinate branches the opportunity to participate in the crafting of relief.¹⁶⁴

A second limitation of state input standards is that a particular state may have failed to develop standards in some areas that are important for defining a comprehensive right to an adequate education. In some cases, this failure may be attributed to the fact that a state has not kept pace with regional, national, and international expertise concerning educa-

161. See, e.g., OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA (1940).

162. Compare *Performance-Based Accreditation Standards*, *supra* note 41, at (2)(c) (specifying the following maximum class sizes: grades K-3, 25 students; grades 4-8, 32 students; grades 9-12, 35 students) with PLAN FOR EXCELLENCE, *supra* note 41, at 89 (recommending a pupil to teacher ratio of 25:1).

163. *Harper Opinion*, *supra* note 12, at 133. The court specifically mentioned a group of schools surveyed by plaintiffs' expert with an average largest class size of 37.6; a county with classes that exceeded 40 students; another county with classes that exceeded 35 students; and a first-grade class in another county with a pupil-teacher ratio of 43:1. *Id.*

164. See *id.* at 166.

tion policies.¹⁶⁵ In other cases, the failure may result from the inability of some groups to bring their educational needs to the legislative or administrative fore. When such omissions occur, a court attempting to give effect to a constitutional right to an adequate education must look beyond a state's own standards.

Finally, while failure to meet state statutory and regulatory standards can provide evidence of educational inadequacy, allowing them to define or limit the constitutional contours of educational adequacy would render constitutional mandates meaningless. The danger of undue deference to such state standards is especially great when, as in Alabama, overall educational funding is low and legislative and regulatory bodies tend to focus on what they can "afford" rather than on what students need to prepare them for life in today's society.¹⁶⁶

National and professional input standards share many of the advantages and some of the disadvantages of their state analogues. First, like state standards, they offer a court a fairly comprehensive set of standards that can be applied to assess many aspects of education program adequacy.¹⁶⁷ Second, at least some of these standards, such as professional accreditation standards, can be adapted to meet a particular state's concerns. A third advantage of national input standards is that they are not dependent on local political processes. Instead, they can focus attention and resources on historically disadvantaged groups that may not have the resources to press their agenda. A final advantage of national input standards is that they can help to keep a state public school system at pace with evolving national standards of program adequacy in a particular area, such as the education of students from socioeconomically disadvantaged backgrounds.¹⁶⁸

Input standards in general, however, share a common limitation: they focus on the resources available to students, without regard to the effectiveness of those resources in improving

165. There is a developing and growing literature on the need for "world class" standards in reading, mathematics and science. *E.g.*, AMERICAN FED'N OF TEACHERS, WHAT COLLEGE-BOUND STUDENTS ABROAD ARE EXPECTED TO KNOW ABOUT BIOLOGY: DEFINING WORLD CLASS STANDARDS (1994); Bonnie Grossen, *Overview: Toward World Class Standards*, EFFECTIVE SCH. PRACTICES, Summer 1993, at 1 (the entire issue is devoted to articles discussing worldwide educational standards).

166. *See, e.g.*, Sandra Sims-deGraffenried, *James' "Foundation" Has Cracks*, MOBILE PRESS, Sept. 24, 1995, at 1C.

167. *See supra* Part II.B-C.

168. *See supra* Part II.D.

student development. Researchers and policymakers increasingly recognize that an adequate education system must ensure not only that schools provide students with adequate resources but also that all children achieve at high levels.¹⁶⁹ Therefore, without discounting the importance of inputs in creating the conditions for learning to take place, courts also must look to output standards for an evaluation of whether children are being provided with an adequate education.

B. Using State and Nationally Recognized Output Standards and Linking Input Deficiencies to Results

In the *Harper* litigation, the court relied on evidence of both input deficiencies and state and nationally recognized output standards, looking to achievement standards contained in the state performance-based accreditation system as well as to dropout rates and preparation for higher education and for the workforce.¹⁷⁰ The court's reliance on output standards is consistent with the increased emphasis by educators and researchers on achievement standards for accreditation and evaluation or accountability purposes. In establishing that a public school system is not adequate, however, courts and advocates should not view education input and achievement standards as mutually exclusive criteria. Advocates must be careful to direct a court's attention to the interrelationship between inputs and outputs in evaluating adequacy: adequate inputs are necessary to create the conditions in which learning can take place. Conversely, output standards help to determine the kinds of resources that students require in order to meet state-mandated achievement standards.

The *Harper* court clearly recognized the links between inputs and outputs. The court's decision relied on extensive testimony about the impact of even the most basic kinds of input deficiencies on a child's ability to learn. The court saw and heard evidence about classrooms so loud that the students had

169. See, e.g., Clune, *supra* note 5, at 377-79; Jeannie Oakes, *What Educational Indicators? The Case for Assessing the School Context*, 11 EDUC. EVALUATION & POL'Y ANALYSIS 181 (1989) (arguing that useful education indicator systems will involve assessments of both school context and school outcomes).

170. See *supra* Part III.

to wear headphones;¹⁷¹ leaking roofs accompanied by flooded classrooms and the destruction of maps and charts; unremedied maintenance problems, such as window panes that would fall out during class time, rodent and insect infestation, and unsanitary conditions in restrooms.¹⁷² The Governor of Alabama acknowledged, in deposition testimony, that schools in serious states of disrepair were not conducive to learning, that extensive and ongoing use of portable classrooms was unacceptable,¹⁷³ and that leaking roofs do not provide an environment conducive to learning.¹⁷⁴

Similarly, the court's findings concerning textbooks, supplies, equipment, and transportation recognized the impact of specific input deficiencies on a student's ability to learn. Testimony about textbook shortages stressed that students sometimes had to share books and were not assigned homework because of book shortages.¹⁷⁵ Admitting the importance of adequate, up-to-date textbooks, Governor Hunt agreed that students who must share textbooks and cannot take textbooks home are at a disadvantage.¹⁷⁶ Perhaps the most vivid description of the impact of equipment shortages came from a teacher who recounted having to show students a picture of a microscope in her science class because there were none available for use.¹⁷⁷ Even transportation deficiencies were described in terms relating them to adverse effects on a student's ability to learn.¹⁷⁸

The *Harper* court also credited extensive expert testimony on the extent to which specific input deficiencies contribute to poor educational results. For example, Dr. William Spencer found that Alabama's high dropout rate was directly related to the inadequacy of its school system.¹⁷⁹ In particular, he pointed to inadequacies in counseling, in assistance with academics, and in dropout prevention programs as part of the cause of the

171. See *supra* note 144 and accompanying text.

172. See *Harper Opinion*, *supra* note 12, at 130–31.

173. Hunt Deposition, *supra* note 86, at 66; see also *Harper Opinion*, *supra* note 12, at 129 (noting that over 2200 portable classrooms were in use in Alabama, many of them permanent).

174. Hunt Deposition, *supra* note 86, at 108; see also *Harper Opinion*, *supra* note 12, at 130 (reciting the evidence of leaking roofs).

175. *Harper Opinion*, *supra* note 12, at 134.

176. Hunt Deposition, *supra* note 86, at 76.

177. See *Harper Opinion*, *supra* note 12, at 135.

178. See *id.* at 136.

179. *Id.* at 136–37.

high dropout rate.¹⁸⁰ Similarly, the Director of Matriculation and Retention at Shelton State Community College attributed students' lack of preparation for college-level work to "a poor education system."¹⁸¹

Finally, the court rejected the defendants' contention, put forward in expert testimony by Dr. Eric Hanushek, that there is no evidence of a systematic relationship between spending on schools and student achievement¹⁸² and credited instead plaintiffs' witness, Dr. Ronald Ferguson, whose research demonstrated a positive correlation between Alabama students' achievement and certain expenditures.¹⁸³ In the end, Dr. Ferguson's testimony, along with the plaintiffs' overall emphasis on the relationship between input deficiencies and poor educational results, prevailed.¹⁸⁴

CONCLUSION

Harper presents a clear example of a case in which an education adequacy claim not only was possible but also was a necessary counterpart to a more traditional equity claim. The liability phase of the case presents a model for establishing education program inadequacy through a combined approach using state and nationally recognized standards regarding both inputs and outputs.

The plaintiffs having prevailed at the liability stage, the parties then engaged in a remedy process that resulted in a

180. *Id.* at 137; see also Spencer & Bearden, *supra* note 124 (summarizing the results of research regarding the causes and effects of dropping out of school, as well as the characteristics of dropouts, in Alabama).

181. See *Harper Opinion*, *supra* note 12, at 137.

182. *Id.* at 140. Dr. Hanushek is currently Professor of Economics and Political Science at the University of Rochester. See *id.* For a summary of his proposed testimony, see Deposition of Eric A. Hanushek, *Alabama Coalition for Equity* (Nos. CV-90-883-R, CV-91-0117-R) (on file with the *University of Michigan Journal of Law Reform*).

183. *Harper Opinion*, *supra* note 12, at 140. Dr. Ferguson is a Professor of Public Policy at the John F. Kennedy School of Government and Malcolm Wiener Center for Social Policy, Harvard University. See *id.*

184. See *id.* The court found that "Dr. Ferguson's analysis of the relationship between school spending and student achievement in Alabama [was] superior in terms of data and research design to that of Dr. Hanushek." *Id.* For a discussion of the literature on whether funding affects school quality, see W. Lance Conn, *Funding Fundamentals: The Cost / Quality Debate in School Finance Reform*, 94 EDUC. L. REP. 9 (1995).

Remedy Order¹⁸⁵ establishing a framework for a constitutionally adequate and equitable public school system.¹⁸⁶

Emphasis on the relationship between inputs and outputs continued as the case progressed from liability to remedy. The *Harper* court's ruling on liability set the stage for the remedial phase by accepting the plaintiffs' definition of adequacy in terms of preparation for the responsible duties of life and by further defining adequate educational opportunities to consist of, at a minimum, an education that provides students with the opportunity to attain nine specified capacities.¹⁸⁷ The Remedy Order begins with seven basic operating assumptions.¹⁸⁸ It then

185. See Remedy Order, *supra* note 15.

186. For a summary of the litigation as of October 1995, see *supra* note 15. As this Article went to press, the new judge in the case had issued an order denying motions to dismiss or vacate the Remedy Order, certifying it as a final order, and setting the case for arguments on whether newly enacted legislation satisfied the Remedy Order. See *id.*

187. The court described nine capacities as follows:

(i) sufficient oral and written communication skills to function in Alabama, and at the national and international levels, in the coming years;

(ii) sufficient mathematic and scientific skills to function in Alabama, and at the national and international levels, in the coming years;

(iii) sufficient knowledge of economic, social, and political systems generally, and of the history, politics, and social structure of Alabama and the United States, specifically, to enable the student to make informed choices;

(iv) sufficient understanding of governmental processes and of basic civic institutions to enable the student to understand and contribute to the issues that affect his or her community, state, and nation;

(v) sufficient self-knowledge and knowledge of principles of health and mental hygiene to enable the student to monitor and contribute to his or her own physical and mental well-being;

(vi) sufficient understanding of the arts to enable each student to appreciate his or her cultural heritage and the cultural heritages of others;

(vii) sufficient training, or preparation for advanced training, in academic or vocational skills, and sufficient guidance, to enable each child to choose and pursue life work intelligently;

(viii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in Alabama, in surrounding states, across the nation, and throughout the world, in academics or in the job market; and

(ix) sufficient support and guidance so that every student feels a sense of self-worth and ability to achieve, and so that every student is encouraged to live up to his or her full human potential.

Harper Opinion, *supra* note 12, at 166.

188. These assumptions are as follows:

a. All Alabama students can learn at significantly higher levels.

b. The knowledge exists to help all Alabama students learn at significantly higher levels.

c. The diversity, including racial and ethnic, that parents, teachers, and students bring to Alabama's education system must be respected, and all education must be provided in an atmosphere free from prejudice of whatever variety.

lists ten essential components of a constitutionally adequate and equitable public school system.¹⁸⁹ These components themselves reflect the combined emphasis on inputs and outputs.

The Remedy Order is premised on the necessity of linking resources, authority, and accountability to ensure that the public school system enables students to develop the capacities that are the products of an adequate education. The first section of the Remedy Order states that the system must be performance-based and calls for the development of student performance standards based on the nine capacities identified in the liability decision, as well as for corresponding development of educator performance standards.¹⁹⁰ It also mandates an academically rigorous common core curriculum for all students,¹⁹¹ eliminates a general track of undemanding courses, and prohibits tracking.¹⁹²

d. All learning environments in the state must be safe, sanitary, conducive to learning, and have adequate resources.

e. Teachers, provided with necessary support, are key to school success.

f. All special education needs, including the needs of students with disabilities, must be addressed.

g. A partnership among educators, students, families, businesses, and communities is necessary for students to achieve educational success.

Remedy Order, *supra* note 15, at 2.

189. The headings for the sections describing these components are:

- I. The Public School System Must Be Performance Based;
- II. The System Must Incorporate Mechanisms to Ensure Accountability at All Levels;
- III. Principals, Teachers and Parents Must Have a Major Role in Instructional Decisions;
- IV. School Staff Must Be Provided with Staff Development Opportunities, Instructional Support and Reasonable Compensation;
- V. Significant Non-School Barriers to Learning Must Be Addressed and Minimized;
- VI. Early Childhood Programs Must Be Provided for Certain Populations;
- VII. The System's Infrastructure Must Be Sound;
- VIII. Technology Shall Be Used to Raise Student and Teacher Productivity and Expand Access to Learning;
- IX. Special Education Shall Be Part of an Inclusive System of Education; and
- X. Public School Funding Must Be Equitable and Adequate.

Id. at 2, 7-9, 11-14, 17.

190. *See id.* at 2-7.

191. For a thorough treatment of the debate over a core curriculum and the history of similar controversies about the form and content of public education in the United States, see generally TONI MARIE MASSARO, CONSTITUTIONAL LITERACY: A CORE CURRICULUM FOR A MULTICULTURAL NATION (1993).

192. *See* Remedy Order, *supra* note 15, at 4-5. Anne Wheelock, one of the plaintiffs' experts during the remedy phase, depicts the harm inflicted by ability grouping and describes strategies for untracking schools in ANNE WHEELOCK, CROSSING THE TRACKS: HOW "UNTRACKING" CAN SAVE AMERICA'S SCHOOLS (1992). Acknowledging

The second section deals with accountability and requires that "[s]chools shall be provided with adequate resources and with the authority necessary to achieve the results for which they are to be held accountable."¹⁹³ Consistent with mounting calls by nationally recognized experts in school reform for increased participatory leadership,¹⁹⁴ the Remedy Order's third section provides that "[p]rincipals, teachers and parents shall have the authority to participate in school-based decision-making relating to curriculum and instructional practices . . . and . . . shall have significant input into the selection of faculty and staff and budgetary decisions."¹⁹⁵

Other sections of the Remedy Order focus on assuring adequate resources. These are sections relating to adequacy and equity in areas such as staffing, compensation and staff development;¹⁹⁶ adequate infrastructure in the form of resources such as buildings, books, and buses;¹⁹⁷ and increased use of

the controversy over tracking, attorney and civil rights activist Rose M. Sanders, who led a bitter fight against tracking in the Selma, Alabama City School System in the early 1990s and who is a founder of the Coalition of Alabamians Reforming Education (CARE), describes tracking as the civil rights issue of the 1990s. This information is based on conversations between Martha I. Morgan and Rose M. Sanders.

193. Remedy Order, *supra* note 15, at 7.

194. See generally PAMELA BULLARD & BARBARA O. TAYLOR, MAKING SCHOOL REFORM HAPPEN (1993) (arguing that successful schools require ongoing change and an emphasis on the role of the people behind the process who are willing to make those changes); JEANNIE OAKES & MARTIN LIPTON, MAKING THE BEST OF SCHOOLS (1990) (arguing that the best schools help all children rather than only a select group and that parents, educators, and policymakers make the best schools possible); SEYMOUR SARASON, THE PREDICTABLE FAILURE OF EDUCATIONAL REFORM: CAN WE CHANGE COURSE BEFORE IT'S TOO LATE? (1990) (arguing that the educational hierarchy needs to be altered in favor of granting teachers more power and, hence, more influence over educational reform).

School-based decision making has been identified as a key component of effective school reform in studies of teachers' views of school reform. See THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, REPORT CARD ON SCHOOL REFORM: THE TEACHERS SPEAK 8 (1988). The Carnegie Foundation conducted a survey of 13,500 teachers, *id.* at 1, concluding that "[w]hat is urgently needed—in the next phase of school reform—is a deep commitment to make teachers partners in renewal, at all levels," *id.* at 11. A more recent study based on interviews with 2000 teachers, financed by the Ford Foundation's Education and Cultural Division, and titled *Testing Assumptions: A Survey of Teachers' Attitudes Toward the Nation's School Reform Agenda*, found high levels of support among teachers for school-based management plans, which they viewed as having made far greater impact on their schools than other changes. See Samuel Weiss, *Teachers Feel Left Out of Reform, Study Says*, N.Y. TIMES, Sept. 26, 1993, at 34.

195. Remedy Order, *supra* note 15, at 8.

196. *Id.* at 9–10.

197. *Id.* at 12–13.

technology.¹⁹⁸ Yet throughout these provisions, the Remedy Order stresses the relationship of inputs to achievement. For example, the fifth section emphasizes what often are referred to as "school-linked services"—and thus addresses the relationship between inputs and readiness to learn.¹⁹⁹ In addition, the Remedy Order includes explicit references to established programs with proven success, such as Success for All²⁰⁰ and Reading Recovery,²⁰¹ as examples of the kinds of effective programs required for all at-risk children in kindergarten through third grade and all at-risk children failing to meet performance standards in grades four through twelve.

The Remedy Order provides a framework for addressing the violations found in the *Harper* court's decision on liability. It sets out basic principles governing the provision of adequate and equitable educational opportunities, leaving the defendants to develop more specific implementation plans for satisfying the decision's general requirements. Different deadlines are established for filing plans in compliance with the Remedy Order's various requirements, and parties are allowed to file objections to these implementation plans.²⁰²

Given the structure of the Remedy Order and the status of the litigation, it would be premature to analyze its overall effectiveness.²⁰³ One obvious challenge in implementing a remedy order of this type is to ensure adequacy and equity in the distribution of resources while preserving the flexibility needed to enable decentralized, participatory decision making to function effectively. Just as the trial phase of *Harper* provides a model for establishing liability based on a combined approach employing state and nationally recognized input and output standards, the Remedy Order may provide a blueprint for developing remedial frameworks in ways that combine input and results-oriented approaches to education reform.

198. *Id.* at 13–14.

199. *Id.* at 11.

200. *Id.* at 10. For a description of the Success for All program, see SUCCESS FOR ALL, *supra* note 98.

201. Remedy Order, *supra* note 15, at 10. For a discussion of the Reading Recovery program, see Gay Su Pinnell, *Reading Recovery: Helping At-Risk Children to Read*, 90 ELEMENTARY SCH. J. 161 (1989).

202. The Remedy Order reserves plaintiffs' rights to object to plans filed pursuant to the order, to monitor compliance with the order, and to bring to the court's attention any failure of the order to remedy the violations found in the liability order. Remedy Order, *supra* note 15, at 20–21.

203. For discussion of the status of the litigation as of October 1995, see *supra* note 15.